SUPREME COURT OF THE UNITED STATES.

No. 356.

THE UNITED STATES, PLAINTIFFS,

vs.

WILLIAM CRAFT.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

1 THE UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages, numbered from one to ten, inclusive, contain a true and complete transcript of the record and proceedings had in said court, in the case of the United States *against* William Craft, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this fourth day of Dec'r, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the said United States the ninety-first.

[L. S. KENNETH G. WHITE, *Clerk*.

[5-ct. stamp, cancelled.]

2 Circuit court of the United States of America for the southern district of New York, in the second circuit.

At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, begun and held at the city of New York, within and for the district and circuit aforesaid, on the third Monday of October, in the year of our Lord one thousand eight hundred and sixty-six, and continued by adjournment to and including the twenty-first day of November, in the year of our Lord one thousand eight hundred and sixty-six.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present, that William Craft late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the twenty-ninth day of October, in the year of our Lord one thousand eight hundred and sixty-six, at the southern district of New York, and within the jurisdiction of this court, did knowingly exercise and carry on the trade, business, and profession of a lottery ticket dealer without the payment of such special tax, to wit, the sum of one hundred dollars, as is in that behalf required by the statutes of the United States, against the peace of the said United States and their dignity, and against the form of the statute of the said United States in such case made and provided.

[L. S.] SAMUEL G. COURTNEY,
United States District Attorney.

3

4 U. S. circuit court.

THE UNITED STATES OF AMERICA
vs.
WILLIAM CRAFT.

Bond cancelled and prisoner discharged on his own recognizance.
Filed Nov. 21, 1866.

5 United States circuit court, southern district of New York.

THE UNITED STATES
vs.
WILLIAM CRAFT.

And the said William Craft, by Sam'l G. Adams, his attorney, cometh into court here, and having heard the said indictment read, says that the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he, the said William Craft, is not bound by the law of the land to answer the same, and this he is ready to verify; wherefore, for want of a sufficient indictment in this behalf, the said William Craft prays judgment, and that by the court he may be dismissed and discharged from the said premises in the indictment specified.

SAM'L G. ADAMS.

Indorsed: United States circuit court, southern district of New York. The United States *vs.* William Craft, demurrer.
Filed Nov. 27th, 1866.

6

7 Circuit court of the United States for the southern district of New York.

THE UNITED STATES
vs.
WILLIAM CRAFT.

And Samuel G. Courtney, United States attorney for the southern district of New York, who prosecutes for the said United States in this behalf, saith that the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said William Craft to answer the same; and the said Samuel G. Courtney, who prosecutes as aforesaid, is ready to verify and prove the same as the court here shall direct and award; wherefore, inasmuch as the said William Craft hath not answered to the said indictment, nor hitherto in any manner denied the same, the said Samuel G. Courtney for the said United States prays judgment, and that the said William Craft may be convicted of the premises in the said indictment specified.

SAMUEL G. COURTNEY,

8 *U. S. Attorney for the Southern District of New York.*

9 At a stated term of the circuit court of the United States of America for the southern district of New York, in the second circuit, held at the city hall, in the city of New York, on the 30th day of Nov., in the year of our Lord one thousand eight hundred and sixty-six.

Present: The honorable Samuel Nelson, an associate justice of the Supreme Court of the United States, and the Hon. David A. Smalley, dist. judge.

THE UNITED STATES
v.
WILLIAM CRAFT.

This cause came on to be heard at the circuit court of the United States, held in and for the southern dist. of New York, on the thirtieth day of November, A. D. 1866, of the term of October of said year, upon a demurrer to the indictment theretofore duly found, which indictment, demurrer, and the joinder thereto are hereunto annexed.

And thereupon the judges of this court proceeded to hear the arguments of counsel, and to consider the said cause; whereupon, and during such hearing, a question occurred upon which the opinions of the said judges were opposed, which said question is the following:

"Is the law imposing the special tax, in the said indictment mentioned, and for non-payment of which, by the defendant, the same was preferred and found valid, or is the said law, in so far as it

authorizes the levy and collection of such tax, unconstitutional and void?''

And upon the happening of the said disagreements the counsel for the plaintiffs did request the point thereto to be stated under the direction of the said judges, which having been done as before set forth, and no judgment having been entered in the said cause, the said point of disagreement is hereby, upon such request, stated as aforesaid, and certified under the seal of this court to the Supreme Court of the United States for its opinion and direction in the premises.

Indorsed: U. S. circuit court. The United States *vs.* William Craft. Certificate of division of opinion.

Filed Nov. 30th, 1866.

In the Supreme Court of the United States.

DECEMBER TERM, 1866.

BRIEF FOR THE UNITED STATES.

THE UNITED STATES *vs.* WILLIAM CRAFT.

This case is upon a division of opinion of the judges of the circuit court of the United States for the southern district of New York.

It appears that the defendant was indicted in the southern district of New York on the 21st of November, 1866, for carrying on and exercising in that district the business and profession of a lottery-ticket dealer, without the payment of the special tax of $100 required by the statutes of the United States.

The defendant demurred generally to the indictment, and there was a joinder in demurrer by the United States. Upon the hearing of this demurrer a question occurred upon which the opinions of the judges were opposed, and the point of disagreement was stated and certified in the words following: "Is the law imposing the special tax in the said indictment mentioned, and for non-payment of which by the defendant the same was preferred and found, valid, or is the said law, so far as it authorizes the levy and collection of such tax, unconstitutional and void?"

The internal revenue act of July 13, 1866, (Acts of 39th Congress, 1st session, page 113,) provides, "That any one who shall exercise or carry on any trade, business or profession, or do any act hereinafter mentioned, for the exercising, carrying on, or doing of which a special tax is imposed by law, without payment thereof as in that behalf required, shall, for every such offence, besides being liable to the payment of the tax, be subject to imprisonment for a term not exceeding two years, or a fine not exceeding five hundred dollars, or both,

and such fine shall be distributed between the United States and the informer, if there be any, as provided by law."

In a subsequent section of the same act (page 116) it is enacted that "lottery ticket dealers shall pay one hundred dollars. Every person, association, firm, or corporation who shall make, sell, or offer to sell lottery tickets or fractional parts thereof, or any token, certificate, or device representing or intending to represent a lottery ticket or any fractional part thereof, or any policy of numbers in any lottery, or shall manage any lottery, or prepare schemes of lotteries, or superintend the drawing of any lottery, shall be deemed a lottery-ticket dealer: *Provided*, That the managers of any lottery shall give bond in the sum of one thousand dollars that the person paying such tax shall not sell any tickets or supplementary ticket of such lottery which has not been duly stamped according to law, and that he will pay the tax imposed by law upon the gross receipts of his sales."

The same act contains, on page 122, the following: "*Provided*, That the payment of any tax imposed by law shall not be held or construed to exempt any person carrying on any trade, business, or profession, from any penalty or punishment provided by the laws of any State for carrying on such trade, business, or profession within such State, or in any manner to authorize the commencement or continuance of such trade, business, or profession contrary to the laws of such State, or in places prohibited by municipal law; nor shall the payment of any tax herein provided be held or construed to prohibit or prevent any State from placing a duty or tax for State or other purposes on any trade, business, or profession upon which a tax is imposed by law."

Prior to the act of 1866 the several internal revenue acts of 1862, 1863, 1864, and 1865, which imposed an annual tax on the business of persons engaged in certain trades, occupations, and professions, required that such persons should pay for and obtain yearly a *license* to carry on his business.

By the amendatory act of 1866, the word *license*, wherever

it occurred in the prior subsisting acts, was omitted, and the words "*special tax*" substituted.

This change relieves us of the embarrassment felt by some from the use of the word license as importing an authority to carry on the business for which it was taken out. As that term, used in these acts, has been construed by this court not to carry or import any authority to carry on a business forbidden by State laws, it was unnecessary to make the change of phraseology which out of abundant caution has been made.

With this preliminary statement of the legislation of Congress we are prepared to consider the question certified.

There is in terms an alternative expressed in the question—that is to say, whether the law imposing the tax mentioned in the indictment is valid, or whether said law, in so far as it authorizes the levy and collection of such tax, is unconstitutional and void.

Literally the first part of the certificate applies to the whole law, and the second part to so much only of the law as authorizes the special tax in question.

It is clear enough that it was intended to bring up only the question as to the validity of this special tax, and that the alternative was a mere form of expression so as to put the question whether *that* was valid or whether it was void. Notwithstanding this, there must, from the alternative form given to the same question, necessarily be two answers given, for a simple affirmative or negative answer to the whole certificate would result in a direct contradiction.

The ground upon which the unconstitutionality of this tax is maintained by the defendant is understood to be, that the State of New York has forbidden any one to carry on the business upon which this special tax was imposed.

The constitution of New York, art. 1, sec. 10, provides that no lottery shall thereafter be authorized, "or any sale of lottery tickets allowed within this State."

The revised statutes of New York declare that every lottery shall be deemed unlawful, and a common nuisance. They provide, by fine and imprisonment, against opening or drawing

lotteries, against advertising for the sale of tickets, and against selling any ticket or part of a ticket in any lottery, device or game of chance not authorized by law. They also provide that any prize drawn in any lottery, forbidden by law, shall be forfeited to the use of the poor. 1 Revised Statutes of New York, edition of 1863, pp. 617, 618, 619, 620.

I do not find any special reference to carrying on the business of a lottery-ticket dealer, nor any express provision declaring such profession or business unlawful.

The first of what are called the enumerated powers conferred on Congress by the Constitution is contained in the first clause of the eighth section, in these words:

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defence and general welfare of the United States." This power is first in order, and first in importance.

It is a plenary power, subject only to the following limitations:

1. That all duties, imposts and excises shall be uniform throughout the United States.

2. That no capitation or other direct tax shall be laid unless in proportion to numbers according to a fixed rule.

3. That no tax or duty shall be laid on articles exported from any State.

The power of taxation thus conferred is only limited in the particulars specified. These express exceptions, according to an established rule of construction, prove the universality of the grant. The two first exceptions do not limit the power, but rather furnish rules for its exercise. The third exception is the only one that takes any subject-matter out of its operation. Not one of them has any application to the subject-matter upon which the tax is levied in the case at bar, unless it be that one which prescribes that all *excises* shall be uniform throughout the United States.

The tax in question is levied upon a business or profession. It is not a direct tax, for that seems to be limited to capitation taxes and to taxes on lands. It is an indirect tax and may

properly be designated as an *excise*, which is defined by Webster in his Dictionary:

"An inland duty or impost operating as an indirect tax on the consumer, laid originally only on certain products of home industry and consumption, but afterward levied on some important articles, as tobacco, wine, raisins, and loaf sugar, which are now transferred to the customs; it is also levied on licenses to pursue certain trades and deal in certain commodities."

There can be no question, therefore, that the power is granted to Congress to levy the tax on this business.

All that remains to be considered is, whether its levy in the State of New York is prohibited by force of the law of that State which forbids the exercise of the business within the State.

The State has power to tax this business concurrent with the federal power. Both may operate on the same subject-matter. The State has also the power to forbid the exercise of this business within its territory, and to declare it unlawful and contrary to its domestic policy.

First, as to the concurrent power. If a tax be laid on a specific article by each government, and the owner happens to be unable to pay both, and the article is only sufficient to pay one tax, which tax is entitled to priority? Chancellor Kent answers the question that the federal tax is paramount. (Kent's Com., 11th ed., p. 423.)

Next, as to the federal power to tax a business made unlawful by State legislation.

The business being a matter within the scope of State authority, may be forbidden by the State.

If, in the exercise of federal power, such a business comes within its range—if Congress has the power, under the Constitution, to regulate it—then State regulation must be exercised in subordination to the federal authority.

The argument for the defendant proceeds upon the assumption that this business is exclusively a matter of State regulation, and that the imposition of the federal tax contravenes that regulation by authorizing the business.

The tax is not a license or authority to carry on the business either express or implied. It was not so intended. On the contrary, as we have seen, it is expressly declared that it shall have no such operation.

It is next contended by the defendant that it is contrary to public policy to derive a revenue from an unlawful business.

The public policy of New York is clear that this business should not be carried on; but there is no such public policy, as to this business, declared by Congress. The tax is levied upon all persons who carry on this business, whether they carry it on lawfully or unlawfully. The policy of federal legislation is to tax *the business* everywhere, and, furthermore, to make the tax *uniform* throughout the United States. In some of the States the business is lawful and is one source of revenue for the State. In those States the person carrying on the business pays the State a tax or license for the privilege. No one doubts his liability to pay an additional tax to the federal government. The construction claimed by the defendant involves these consequences: that it requires the lawful dealer to carry on his business subject to the double imposition of State and federal taxation, and allows the unlawful dealer to escape from both; and, next, that it invades the rule of *uniformity* prescribed for federal taxation.

I do not say that the State has not the power to forbid the exercise of the business, or that Congress has the power to legalize it. The case does not require me to affirm either proposition.

I may admit, *ex gratia*, that in the exercise of its prohibitory power the State may banish the business from its territory, and thus indirectly take the subject-matter from the operation of federal taxation. But here, notwithstanding the prohibition, this business continues to be carried on in the State, and it is upon the business that the federal tax is levied. Congress does not create the business and then tax it, but simply levies the tax where it finds the business in operation.

It is too clear for argument that Congress may tax any business in any State, so that it proceeds by the rule of uniformity.

No question of public policy can be set up against the clear exercise of this power. It may tax the business to any extent—even to absolute prohibition. It may pass over the profitable business and make the burden fall upon the unprofitable. It may tax the unlawful business and exempt the lawful business, or what is worse, tax what is lawful and exempt what is unlawful. Congress, which has the power, is also the exponent of the public policy in the exercise of the power.

I have said, for the purposes of the argument, that the State might by prohibition drive the business out of its territory, and so remove it from federal taxation. But if this is true at all, it is only true as incidental to State policy and to relieve the State from an injurious subject. But while the business is carried on in the State, it is not in the power of the State to shield it from the federal tax.

The State cannot by direct enactment exempt any property or business in the State from federal taxation, and what it cannot do directly it cannot do indirectly. Public policy is of no avail here, for while there is a State policy for exemption, there is a federal policy for taxation. One policy is local and subordinate; the other is national and paramount.

In support of the positions maintained in the foregoing brief, I proceed to cite some cases:

1. As to the plenary character of federal taxation.

It is coextensive with the territory of the United States. (Loughborough *vs.* Blake, 5 Wheat., 317.)

It extends to all taxable objects, without any exception, except exports from a State. (Hylton *vs.* United States, 3 Dall., 174.)

2. The power of taxation by the States, though only *expressly* limited by the Constitution of the United States as to imports and exports, has *implied* limitations.

A State cannot tax the salary of an officer of the United States (Dobbin *vs.* Erie county, 16 Peters, 436;) nor stock of the United States (Weston *vs.* Charleston, 2 Peters, 449;) nor such a fiscal agency of the United States as the Bank of

the United States, (McCulloch *vs.* Maryland, 4 Wheat., 316; Osborn *vs.* the United States Bank, 9 Wheat., 738.)

Although the power of taxation is concurrent in the United States and the States, yet "such is the paramount character of the Constitution that its capacity to withdraw any subject from the action of even this power is admitted." (Marshall, C. J., in McCulloch *vs.* Maryland, 425.)

The collision between federal and State law in the case at bar, does not arise upon the exercise of the same concurrent power, but upon the exercise by each sovereignty of its independent power. If, however, in the exercise of the vital power of taxation by a State, the subject of the tax may, in the exercise of federal power, be withdrawn from State taxation, how can it be said that in the exercise of its mere police power the State may withdraw or forbid the exercise of the federal tax power over the same subject?

I refer next to the case of New Orleans *vs.* Costello, 14 Louisiana Annual Reports, p. 37.

It seems that the State had prohibited brothels by fine and imprisonment. (Revised Stat. of Louisiana, p. 150.)

It was held by the supreme court of Louisiana in this case that the act did not prevent the city from levying a tax on such houses, "provided they do not license houses of this class."

In conclusion, I beg the attention of the court to the many instances found in the internal revenue laws upon which similar objections to those made in this case might be made.

These laws regulate, for the purpose of taxation, the *recording laws* of the States. (14 United States Statutes, p. 141, sec. 152; p. 142, sec. 158.)

The laws of evidence; ibid, p. 146, sec. 163.

The proceedings in State courts; see the schedule as to stamps, vol. 12, 479.

HENRY STANBERY,
Attorney General.